93-500

Supreme Court, U.S.
FILED
SEP 21 1993
OFFICE OF THE CLERK

NO. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

FREDA LYNN SIMMONS — PETITIONERS

and PAULA M. RAINES

V.

RANDY ROSS — RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE KENTUCKY SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

DEAN A. LANGDON

Petitioner's Counsel of Record

301 East Main St., Suite 1130

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69 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether Kentucky law allowing a lump-sum settlement of a support obligation for illegitimate children denies them equal protection or due process of law by precluding modification of the settlement based on changed circumstances?

2. Whether the inability of parents of illegitimate children to recover attorney fees in subsequent paternity proceedings related to support denies such children the equal protection of the law?

PARTIES

In addition to the parties listed in the caption, the Cabinet for Human Resources for the Commonwealth of Kentucky was a party to the proceedings below.

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K.R.S. 406.141 . . . . . xi, 3, 4

Kentucky Rules of Civil Procedure, Rule 60 3

OPINIONS BELOW

The Order of the Kentucky Supreme Court on June 23, 1993, denying Discretionary Review is unreported.

The Order of the Kentucky Court of Appeals on March 9, 1993, denying Discretionary Review is unreported.

The Opinion of the Boyd Circuit Court rendered December 30, 1992 is unreported.

The Orders of the Boyd District Court 1) refusing to set aside the prior agreement of the parties relating to support on September 24, 1992 and 2) finding no authority to award Petitioner's counsel attorney fees on November 30, 1992 are unreported.

JURISDICTION

The Kentucky Supreme Court denied Discretionary Review by an Order dated June 23, 1993. This Petition is filed within 90 days after entry of that Order. Jurisdiction is invoked pursuant to 28 U.S.C. Section 1257.

The ground upon which the jurisdiction of this Court is invoked is that the final ruling of the Kentucky Supreme Court denying discretionary review is reviewable by writ of certiorari where any right set forth is specifically claimed under the Constitution of the United States.

Petitioners claim that the failure of Kentucky's paternity laws or the court with jurisdiction over the issue to permit modification of a lump-sum settlement for support when changed

circumstances arise, or to permit recovery of attorney fees by the parent of a illegitimate child in such proceedings is a denial of equal protection of law under the Fourteenth Amendment of the Constitution.

The trial court and first level appellate court refused to reopen an earlier lump-sum settlement agreement or award Petitioner's counsel attorney fees, and these decisions became final when both the second and third level appellate courts denied discretionary review.

This proceeding draws the constitutionality of a state statute, KRS 406.141, into question, and 28 U.S.C. Section 2403(b) may be applicable.

CONSTITUTIONAL AND STATUTORY PROVISIONS

FOURTEENTH AMENDMENT

Section 1. ...nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

KENTUCKY REVISED STATUTES

403.180

Separation Agreement -- Court may find unconscionable.

(1) upon...the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for maintenance of either of them, and custody, support and visitation of their children.

...

(6) Except for terms concerning the

support, custody, or visitation of children, the decree may expressly preclude or limit modification of terms if the separation agreement so provides.

KENTUCKY REVISED STATUTES

403.220

Costs of action and attorney's fees -- The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees....

KENTUCKY REVISED STATUTES

406.141

Settlement agreements. -- An agreement of settlement with the alleged father is binding only when approved by the court.

STATEMENT OF THE CASE

Lacy Reid Simmons and Cory Randall Simmons were fathered by Randy Ross and born to Lynn Kesling Simmons on January 6, 1983 and December 27, 1984, respectively. Lynn Simmons and Randy Ross were not married, and have never been married.

On July 22, 1986 Lynn Simmons and Randy Ross entered into an Agreed Order providing that Randy Ross would make a lump sum payment of $79,765.00 as child support for his two out-of-wedlock children. At the time this agreement was reached, Lynn Simmons and the children received AFDC to provide for their support. An additional $5,000.00 went to the Kentucky Cabinet for Human Resources as reimbursement for AFDC.

Since entering into the settlement, all parties have encountered substantial changes. Lynn Simmons had been diagnosed with multiple sclerosis, Cory Simmons developed an attention deficit hyperactivity disorder and Lacy Simmons suffered from childhood rheumatoid arthritis. Randy Ross obtained a judgment in excess of eleven million dollars in January, 1992 as a result of his business dealings.

On March 20, 1992, Petitioner Simmons filed a motion to reopen the agreed settlement with the Boyd District Court[1], due to the substantial change in circumstances which had occurred. Lynn

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[1] District Courts are courts of limited jurisdiction in Kentucky, while Circuit Courts have general jurisdiction. Paternity proceedings must be brought in District Court. Divorce proceedings must be brought in Circuit Court.

Simmons sought an increase in child support and also requested attorney's fees for the bringing of her action to re-open the settlement. At the suggestion of the District Court Judge, Simmons subsequently filed a motion to reopen the settlement under Rule 60 of the Kentucky Rules of Civil Procedure.

No equal protection argument was raised in the District Court because Petitioners did not, and could not, know the basis for the court's decision denying relief, much less that relief would be denied.

On September 24, 1992, the Boyd District Court entered an Order denying Simmons' motions, relying in part on Kentucky Revised Statute (KRS) 406.141 and the fact that compromise settlements

are favored by the courts.[2]

On November 30, 1992, the Boyd District Court entered an additional order denying Simmons' motion for attorney fees, finding that it had no legal authority to make such an award, although recognizing that KRS 403.220 permitted such an award.[3]

Simmons and Raines appealed to the Boyd Circuit Court on October 1, 1992, arguing that the District Court's reliance on KRS 406.141 for refusing to reopen the settlement agreement violated equal protection guarantees and that the lack of authority to award attorney fees in a paternity action was constitutionally unsound. Petitioner's

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[2] Boyd District Court Order, September 24, 1992, pages 3-4; Appendix, p. 19a

[3] Boyd District Court Order of November 30, 1992, p. 2; Appendix, p. 10a.

brief on appeal and her argument before the Circuit Court raised the federal questions sought to be reviewed.[4]

On December 30, 1992, the Boyd Circuit Court issued an Order upholding the District Court's opinion, both as to the motion to reopen and the request for attorney fees.

On February 4, 1993, Simmons and Raines sought discretionary review by the Kentucky Court of Appeals. The issues presented to this Court were preserved in Petitioner's brief in support of the motion for discretionary review.[5] This Motion was denied by an Order dated March 9, 1993.

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[4] Appellant's brief on appeal to the Boyd Circuit Court, No. 92-XX-0014, pp. 5-7. Transcript of oral argument before the Boyd Circuit Court, pp. 33-34. Appendix, pp. 28a, 32a.

[5] Brief on Appeal. Appendix, p. 35a.

Simmons and Raines then sought discretionary review by the Kentucky Supreme Court. Again, the issues presented to this court were preserved by their inclusion in the motion for discretionary review.[6] This Motion was denied by an Order dated June 23, 1993. This Petition follows.

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[6] Motion for Discretionary Review, pp. 15-16; pp. 25-29. Appendix, p. 38a.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With Decisions Of The Supreme Courts of Illinois and Wisconsin.

Although Kentucky's Supreme Court has never specifically ruled on the issues presented by this writ, courts of last resort in both Illinois and Wisconsin have held that statutory provisions similar to Kentucky's violate the equal protection guarantee of the Fourteenth Amendment.

This Court granted a writ and remanded the case of Gerhardt v. Estate of Moore, 100 L.Ed.2d 915, following this Court's decision in Clark v. Jeter, 486 U.S. 456, 100 L.Ed.2d 465, 108 S.Ct. 1910 (1988). On remand, the Wisconsin Supreme Court found that the statute denying illegitimate children the right to reopen

a lump-sum award of child support violated equal protection, when legitimate children possessed such right by statute. The state's interest in promoting settlements was not found sufficient to justify the distinction. Gerhardt v. Estate of Moore, Wis., 441 N.W.2d 734, (1989).

More recently, the Supreme Court of Illinois held that a settlement agreement and dismissal in a paternity action did not preclude a subsequent action for support of the illegitimate minor child. Department of Public Aid, ex. rel. Cox v. Miller, Ill., 586 N.E.2d 1251 (1992). The Illinois court relied primarily on the Gerhardt decision, although it also reviewed the applicable Illinois statutes and noted that there were factual differences between the cases. In the

end, the court ruled that the interest of an illegitimate child in being able to obtain support outweighed the state's interest in promoting settlements.

Because the courts of Kentucky never specifically ruled on the constitutional issue presented to them, they have implicitly held that the statutory scheme in Kentucky which creates the disparity between the rights of illegitimate and legitimate children to support does not violate the equal protection guarantees of the Fourteenth Amendment, contrary to the decisions of the Illinois and Wisconsin Supreme Courts.

The Decision Below Involves An Issue Which Has Not Been, But Should Be, Resolved By This Court.

When necessary in the past, this Court has not hesitated to accept review

of decisions which affected the right of illegitimate children to support. This Court long ago recognized that denying illegitimate children the right to support if legitimate children possessed such a right was a denial of equal protection. Gomez v. Perez, 409 U.S. 535, 35 L.Ed.2d 56, 93 S.Ct. 872 (1973).

Since that decision, the main issue which this Court has decided regarding the rights of illegitimate children has been whether or not certain periods of limitation for bringing paternity actions violate equal protection guarantees. Mills v. Habluetzel, 456 U.S. 91, 71 L.Ed.2d 770, 102 S.Ct. 1549 (1982); Clark v. Jeter, 486 U.S. 456, 100 L.Ed.2d 465, 108 S.Ct. 1910 (1988).

While those decisions necessarily involved the ability of an illegitimate

child to seek support from a natural parent, Petitioner has not found any decisions of this Court which examine differences in statutory treatment between legitimate and illegitimate children where modification of support is sought. While some state courts have examined such differences as they relate to modifying support, Petitioners have found no decisions which examine whether recovery of attorney fees by a party seeking modification grants legitimate children a right denied illegitimate children. The same arguments that support granting illegitimate children the right to seek modification of a support award supports granting them equivalent rights to recover attorneys fees for such attempts, as there is no countervailing state interest involved.

CONCLUSION

In short, it is time for this Court to expand its review of the application of equal protection guarantees to illegitimate children by granting this writ. Petitioners pray that their Petition for Writ of Certiorari to the Kentucky Supreme Court be granted to review the decisions below, with proceedings pursuant to the Rules of this Court.

Respectfully Submitted,

DEAN A. LANGDON
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301 East Main Street
Lexington, Kentucky 40507
(606) 259-1383
ATTORNEY FOR PETITIONERS

APPENDIX

Supreme Court of Kentucky

93-SC-210-D

(93-CA-226-MR)

FREDA LYNN KESLING, ET. AL. MOVANTS

BOYD CIRCUIT COURT

V. 92-XX-14

RANDY ROSS RESPONDENT

ORDER

Movants' motion to expedite consideration of this matter is granted.

The motion for review of the decision of the Court of Appeals is denied.

Stephens, C.J., not sitting.

ENTERED June 23, 1993.

/s/ Charles M. Liebson

Deputy Chief Justice

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 93-CA-226-D

CABINET FOR HUMAN RESOURCES EX REL;
FREDA LYNN KESLING (NOW SIMMONS);
PAULA M. RAINES MOVANTS

V. ON MOTION FOR DISCOVERY REVIEW
FROM BOYD CIRCUIT COURT
ACTION NO. 92-XX-14

RANDY ROSS RESPONDENT

* * * * * * * * *

ORDER DENYING DISCRETIONARY REVIEW

BEFORE: DYCHE, HOWERTON, AND JOHNSON, JUDGES.

Having considered movants' motion for discretionary review and the response thereto and movants' motion to substitute properly appendixed motion for

discretionary review, and being sufficiently advised, the Court ORDERS the motion to substitute be GRANTED. The motion for discretionary review is DENIED.

ENTERED: MARCH 9, 1993

/s/ Robert W. Dyche

JUDGE, COURT OF APPEALS

BOYD CIRCUIT COURT

DIVISION II

FILE NO. 92-XX-00014

(85-J-339)

CABINET FOR HUMAN RESOURCES, EX REL.
FREDA LYNN KESLING (NOW SIMMONS)
and PAULA M. RAINES APPELLANTS

VS. FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

RANDY ROSS, RICHARD M.
MARTIN, and JOHN WEBB APPELLEES

****

This matter is before this Court on appeal from an Order of the Boyd Circuit Court entered on September 24, 1992, overruling Appellants Motion to reopen, payment of medical bills, and attorney fees, and increase in child support.

This is a paternity action whereby there was a settlement agreement entered into by and between the Appellants, Cabinet for Human Resources, and Freda Lynn Kesling, and the Appellee, Randy Ross, and approved by the Court on July 22, 1986. The Appellants were represented by counsel at all times during the pendency of the paternity action. The action was settled for $85,000.00 for all present and future child support of the parties' infant children. A division of the settlement was made by Judgment of the Court with part going to the Cabinet of Human Resources, a part going to Freda Lynn Kesling (Simons[sic]), and a part held in trust for the children for future care. As part of the settlement, the Appellee, Randy Ross, was to maintain

hospitalization on the children.

On or about March 9, 1992, the Appellant, Freda Kesling (Simmons) filed a Motion to reopen, for increase in child support, payment of medical bills, and attorney fees. Quite a bit of time has passed from July 22, 1986, to March 9, 1992. The Appellant is requesting that the child support be increased due to the fact that the Appellee, Randy Ross, since the signing of the agreement, has received an approximate 11 million dollar Judgment in the federal courts.

As to the payment of medical bills, an agreement was reached whereby the Appellee, Randy Ross, paid to the Appellant, Freda Lynn Kesling (Simmons), the sum of $10,000.00 for all claims asserted or unasserted by the Appellant relating to health insurance and medical

expenses incurred up to and including April 29, 1992, and Appellee is presently carrying hospitalization on said infant children as per the settlement agreement of July 22, 1986.

The Appellant, Paula M. Raines, has joined in this action for her claim for attorney fees.

This matter is before this Court for a determination of whether or not the Lower Court of Law abused its discretion and its Findings of Fact, Conclusions of Law are erroneous. This Court has reviewed the entire record in this matter, heard arguments of counsel, and finds that the Lower Court did not abuse its discretion and its Findings of Fact, Conclusions of Law are not erroneous. This Court further finds that the Lower Court correctly ruled on the question of

attorney fees.

ORDER

IT IS HEREBY ORDERED AND ADJUDGED that the Order of the Boyd District Court entered September 24, 1992, is affirmed and this appeal is dismissed at the cost of the Appellant.

IT IS FURTHER ORDERED AND ADJUDGED that attorney fees in this action is (sic) denied and overruled.

This is a Final Judgment and no cause for delay.

Entered this 30th day of December 1992.

/s/ Charles S. Sinnette, JUDGE
BOYD CIRCUIT COURT, DIVISION II

I, the undersigned Clerk of the Boyd Circuit Court, do hereby certify that the aforegoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER was this day entered of

record in my office and I have given written notice of said entry by mailing a true and correct copy of same to the following parties:

Paula M. Raines

P.O. Box 12306

Lexington, KY 40508-2306

John A. Webb

P.O. Box 1554

Ashland, Ky. 41105-1554

Richard W. Martin

P.O. Box 2528

Ashland, Ky. 41105-2528

Hon. Edwin Rice, Judge

Boyd District Court

Courthouse Annex

Catlettsburg, Ky. 41129

This the 30 day of December 1992

CLERK, BOYD CIRCUIT COURT

BY: /s/ Rita Blacbaum ,D.C.

92-XX-00014

COMMONWEALTH OF KENTUCKY

BOYD DISTRICT COURT

JUVENILE DIVISION

NO. 85-J-339

FILED

Nov 30 12:55 PM '92

CABINET FOR HUMAN RESOURCES, EX REL.,
FREDA LYNN KESLING, (NOW SIMMONS), &
PAULA M. RAINES, PETITIONERS,

VS: ORDER

RANDY ROSS, RESPONDENT,

The petitioner, Freda Lynn Kesling, (Now Simmons), has moved the court for specific findings of fact and conclusions of law under Civil Rule 52.01 and 52.02, concerning the trial court's refusal to

grant Petitioners' Attorneys' Fees to be taxed against the Respondent.

This action was filed upon a motion by the Petitioner to set aside and alter an agreement for child support originally made in an action under KRS Chapter 406, an action brought under that Chapter as a paternity action.

Petitioner, through her attorney, cites KRS 403.220 as the authority for the allowance of this fee.

FINDINGS OF FACT

1. Kentucky law does not permit the allowance of a fee to be paid one party by another party except where there is express statutory or case law specifically authorizing that fee. CR 4.07, CR 17.03(5), CR 30.07, CR 37.01, .02 & .03, all provide for the allowance of the fees to Warning Order Attorneys,

Guardians ad Litem, to parties' attorneys where those attorneys have failed to obey the orders of Court and the fee is allowed as a sanction, or where the misconduct of parties in obeying the rules providing for discovery and the taking of depositions have caused the adverse party unjustified and unreasonable expenses and additional attorney fees.

2. KRS 453.060 provides for attorneys' fees to be taxed as costs to the successful attorney in a civil action running from $2.50 in District Court to $5.00 in Circuit court and $10.00 in the Court of Appeals. It also allows that a reasonable fee may be taxed as costs and paid to Guardians Ad Litem and Warning Order Attorneys. KRS 453.260 allows for fees to be taxed and paid to attorneys in

actions brought either by or against the Commonwealth where the Commonwealth was unsuccessful.

3. KRS 411.195 is a statute allowing for attorneys' fees in an action resulting from a writing which creates a debt or lien on real property where the debtor, obligor, lender or mortgagor may be required to pay the fee incurred by an obligee or lien holder in the event of a default by the debtor, but only where that obligation to pay the attorney fee is agreed to be paid, in advance, in the original instrument and provided then only if the attorney is not a salaried employee.

4. KRS 403.220 (the divorce chapter) provides that attorney's fees maybe paid to the wife in divorce under doctrines of equity making it unjust not

to do so, and in instances of modification of child support allowances made under the child support uniform guidelines where that allowance is made as a part of a divorce decree entered under Chapter 403.

5. Neither Civil Rule, Statute nor Case Law provides for the allowance of an attorneys' fee to either party in a paternity action brought under KRS Chapter 406. No law is cited by the attorney for the Petitioner giving the District court authority to grant attorneys' fees in an action brought under KRS Chapter 406. The District Court has only those powers expressly given it by Statute. It is not a Court of equity and does not have equity jurisdiction.

For the reasons above stated, the Motion of attorney, Paula M.Raines, as counsel for Petitioner, Freda Lynn Kesling, (now Simmons), was required to be, and was, denied.

This the 30th day of November, 1992.

\s\ Edwin D. Rice

EDWIN D. RICE, JUDGE, DIVISION 1

BOYD DISTRICT COURT

I certify that a true and correct copy of the above Order was handed or mailed, postage prepaid, to the parties and persons listed below, to their respective last known addresses as indicated:

1. Woolery & Emerick
   1557 Winchester Avenue
   P.O. Box 1554
   Ashland, Kentucky 41105-1554
2. Hon. Richard Martin
   Attorney at Law

P.O. Box 2528

431 - 16th Street

Ashland, Kentucky 40582-2528

3. Harris & Raines

Attorneys at Law

P.O. Box 12306

Lexington, Kentucky 40582-2306

4. Ms. Nancy Kay Arthur, Clerk

Boyd Circuit Court

Courthouse Annex

Catlettsbrug, Kentucky 41129

(To place copy in Appeal NO.

92-X00014)

This the 30th day of November, 1992.

NANCY KAY ARTHUR, CLERK

BY:\S\ _____D.C.

BOYD CIRCUIT COURT

DIVISION II

FILE NO. 92-XX-00014

CABINET FOR HUMAN RESOURCES, EX REL.,
FREDA LYNN KESLING (now Simmons)

PETITIONERS

VS: ORDER

RANDY ROSS RESPONDENT

IT IS HEREBY ORDERED that Motion of Petitioner for the Respondent to pay her attorney fees in the sum of $10,000.00 is denied and overruled.

This the 6th day of November 1992.

\s\ Charles S. Sinnette JUDGE

BOYD CIRCUIT COURT, DIVISION II

A copy of the aforegoing ORDER was this day served, by mail, upon:

Paula M. Raines

P.O.Box 12306

Lexington, Ky. 40582-2306

Randy Ross

381 Santa Rosa Blvd.

Ft. Walton Beach, Florida 32548

Richard W. Martin

P.O. Box 2528

Ashland, Ky. 41105-2528

This the 6 day of November 1992

CLERK, BOYD CIRCUIT COURT

BY:\s\ Rita Blacbaum , D.C.

COMMONWEALTH OF KENTUCKY

BOYD CIRCUIT COURT

DIVISION NO. I

CIVIL ACTION NO. 85-J-339

FILED

SEP 24 12:00 pm '92

CABINET FOR HUMAN RESOURCES, EX REL.,
FREDA LYNN KESLING (now Simmons) &
FREDA LYNN KESLING, PETITIONERS

VS: ORDER

RANDY ROSS, RESPONDENT

This is a paternity action, begun in 1985 and settled by the parties by an agreement approved by the Court July 22, 1986. At all times from the beginning of the action through the agreed settlement, the Petitioners were represented by

counsel who actively pursued the case, thoroughly represented the Petitioners, subpoenaed many witnesses, presumably questioned them and had full access to discovery without any limitation. They did not feel it necessary to have evidentiary hearings involving those witnesses, being satisfied with their findings, made an agreed settlement which was approved by the Department (then) for Human Resources and all counsel involved. The agreed settlement thus made was presented to the Court and all counsel represented to the Court that it was fair and conscionable and recommended its approval.

Counsel for Petitioners (at least Petitioner, Freda Lynn Kesling Simmons) now moves to set aside the agreed settlement under CR 60.02(d) and (f), and

moves for reimbursement of medical expenses and attorney fees.

The Court reviewed all pleadings of the parties, their briefs, the record, the law involved, heard all arguments of counsel and makes the following findings:

MOTION TO SET ASIDE THE AGREED SETTLEMENT CR 60.02 (d)

This rule requires that a motion under CR 60.02 (d) must be filed within one year after the entry of the judgment sought to be set aside. This motion is, on its face, far out of time.

Assuming argumento (sic), that the motion is timely, Petitioner failed to make out a prima facia (sic) case either in the pleadings, or in the documents and claims made in support of the motion. That fraud, to be effective, must be "fraud affecting the proceedings, other

than perjury or falsified evidence". This refers to the proceedings prior to the making and approval of the settlement agreement originally made, not after.

The level of that fraud must be shown by clear, unequivocal and convincing evidence. Alvey v. Union, Inc., Ky. App. 697 S.W. 2d, 145, which cites Wahba v. Don Corlett Motors, Ky. App., 573 S.W. 2d. 357. The only assertion made by counsel for Petitioner which might reach this level is her claim that the financial statement made by Respondent's accountant created a false picture of Respondent's financial standing at the time it was made. Respondent filed an affidavit of the accountant who made that financial statement which more than adequately meets this claim. In any event,

Petitioner had every opportunity, prior to the making of the original agreement to thoroughly investigate the accuracy of that financial statement. The failure of the Petitioner to make discovery, at the time, of that very important document indicates that belief on her part, at that time, of it's truthfulness and does not merit a finding of fraud this far after the fact.

The claim of fraud has not been supported either by pleadings or evidence supporting the motion.

CR 60.02 (f) allows the setting aside of a judgment, "...for any other reason of an extraordinary nature justifying relief". Petitioner strongly asserts that a substantial change in the financial condition of the Respondent is such reason of extraordinary nature as to

authorize setting aside the settlement agreement, or is a ground on and of itself, without other legal basis to authorize setting aside the agreement.

To this end, Petitioner cites Mayfield v. Commonwealth, ex rel Phelps, Ky. 546 S.W. 2d 433. Mayfield, however, was a case involving periodic child support payments; is not on all fours with the facts of this case and does not act to set aside or overrule those cases which hold that contracts for support between the father and mother, if supported by adequate consideration, are valid and enforceable. Miller v. Miller, Ky., 335 S.W. 2d 884, Napier v. Hodge, Ky., 293 S.W. 2d 870, Caudill v. Caudill, Ky., 257 S.W. 2d 557.

Compromise settlements are favored by the Courts. M.N. Berry Company v.

Gay, Ky., 434 S.W. 2d 43; Nuckols v. Nuckols, Ky., 169 S.W. 2d 828. See also KRS 406.141 approving settlements of this sort, when approved by the Court.

Petitioner has pled too late; has not sufficiently pled fraud prior to the making of the agreement; has not supported that pleading by documents indicating such fraud, but rather has pled events occurring after the making of the settlement (in some cases years after the settlement) and has shown no other reason of extraordinary nature except the happenstance of good fortune on the part of the Respondent, long after the making of the settlement agreement, totally insufficient to justify reopening the case.

The Court FINDS no valid basis for reopening this case and overrules

Petitioners' motion to reopen.

This the 24th day of September, 1992.

\s\ Edwin D. Rice

EDWIN D. RICE, JUDGE DIV. I

BOYD DISTRICT COURT

I certify that a true and correct copy of the above Order was handed or mailed, postage prepaid, to the parties and persons listed below, to their respective last known addresses as indicated:

1. Hon. Paula Raines
   Harris & Raines
   P.O. Box 12306
   Lexington, Kentucky 40582-2306
2. Hon. John A. Webb
   McKenzie, Woolery & Emrick
   P.O. Box 1554
   Ashland, Kentucky 41105-1554
3. Hon. Richard W. Martin
   Hon. P. Kimberly Watson

Martin, Picklesimer, Justice &
Vincent
P.O. Box 2528
Ashland, Kentucky 41105-2528

This the 24th day of September, 1992.

NANCY KAY ARTHUR, CLERK

BY:\S\ Joy Blair D.C.

BOYD DISTRICT COURT

APPEAL FROM DIVISION II

CIVIL ACTION NO. 85-J-339

APPEAL NO. 92-X-00014

CABINET FOR HUMAN RESOURCES,
EX REL, FREDA LYNN KESLING,
(NOW SIMMONS) APPELLANT
AND PAULA M. RAINES
VS: APPEAL
RANDY ROSS APPELLEES

****

BRIEF FOR APPELLANTS

...

I. The parents of a child whether legitimate or illegitimate, cannot contract away that child's right to support.

...

The Trial Court relied on KRS 406.141 in upholding the settlement

agreement. That statute, part of the Uniform Act on Paternity, states that "An Agreement of settlement with the alleged father is binding only when approved by the Court." This statute merely holds that a settlement will not be binding without court approval; not that once it is approved it is forever binding and non-modifiable.

For the Trial Court to find an agreement between an admitted father of illegitimate children, which is approved by the court, to be non-modifiable is to set up an unconstitutional distinction between legitimate and illegitimate children. The United States Supreme Court in Clark v. Jeter, 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988) struck down a Pennsylvania law setting a 6-year statute of limitations in

paternity actions. The Court unanimously found that this statute violated the equal protection clause in discriminating against illegitimate children.

A Wisconsin case, Gerhardt vs. Estate of Moore, 441 N.W.2d 734 (Wis. 1989), interpreted Wisconsin's statute which denied nonmarital children involved in lump sum child support settlements the ability to seek additional support from the father; a right not denied to marital children. The Wisconsin Supreme Court found this distinction (the same distinction made by inference in the present case) to be an unconstitutional denial of equal protection. That Court held: "We conclude that the lump sum settlement provision is not substantially related to it's asserted state interests and therefore denies nonmarital children

the equal protection of the laws." (Id. 736).

...

Respectfully submitted,

HARRIS & RAINES

BY: /s/ Paula M. Raines

PAULA M. RAINES

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ATTORNEYS FOR APPELLANT

FREDA LYNN KESLING

(NOW SIMMONS)

BOYD CIRCUIT COURT

DIVISION II

APPEAL NO. 92-XX-00014

CABINET FOR HUMAN RESOURCES,

FREDA LYNN KESLING (Now SIMMONS),

and PAULA RAINES, PETITIONERS,

VS: TRANSCRIPT OF ORAL ARGUMENTS

RANDY ROSS, RESPONDENT,

A P P E A R A N C E S

COUNSEL FOR PETITIONERS:

PAULA RAINES

ATTORNEY AT LAW

LEXINGTON, KENTUCKY

COUNSEL FOR RESPONDENT:

KIMBERLY WATSON

MARTIN, PICKLESIMER, JUSTICE & VINCENT

ASHLAND, KENTUCKY

REPORTED BY:

PEGGY ARTHUR

COURT REPORTER

CATLETTSBURG, KENTUCKY

(The action of Cabinet for Human Resources, Freda Lynn Kessling (sic) (now Simmons), and Paula Raines, versus Randy Ross, came on for oral argument before the Honorable Charles S. Sinnette, Judge, Boyd Circuit Court, Division II, on December 15, 1992, at the hour of 1:30 p.m. Following is a complete transcript of said oral arguments.)

...

...She has had to pay significant attorneys fees, over $10,000.00 at this point to pursue this action. And, she needs to be compensated for that. If we don't allow her to be compensated, we're down into a constitutional area because what we have is under the divorce statutes 403, I think it's 260, allows attorneys fees in actions in which

there's a disparity of income between parties. And, the child support guidelines also allow attorneys fees. So if we have a marital parent coming into court and asking for an increase in child support, that person has the absolute right, if you show disparity in income, to have the court, at its discretion, award attorneys fees. Well when we're dealing with nonmarital children, what we're being told by Mr. Ross is there's a distinction now. That the nonmarital children's parent who goes into court cannot get attorneys fees...

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 93-CA-000226

CABINET FOR HUMAN RESOURCES, EX REL.
FREDA LYNN KESLING (NOW SIMMONS)
and PAULA M. RAINES APPELLANTS/PLAINTIFF

VS: MOTION FOR DISCRETIONARY REVIEW

RANDY ROSS APPELLEES/DEFENDANT

****

QUESTIONS OF LAW

...

1. Whether or not a lump sum settlement of child support is modifiable in the same manner as a periodic payment.

2. Whether the parents of a child, whether legitimate or illegitimate, can contract away that child's right to support.

...

12. Whether the Paternity Statutes'

silence as the award of attorney's fees creates an unconstitutional distinction between legitimate and illegitimate children.

REASONS JUDGMENT SHOULD BE REVIEWED

...

Movants also present another issue of first impression: whether attorney's fees may be awarded in a paternity action. Movant will rely for argument on three questions. 1) ... 2) ... 3) Whether KRS 403.220 providing for attorney's fees in a divorce action involving legitimate children creates an unconstitutional distinction between illegitimate and legitimate children; the United States Supreme Court has ruled that a distinction between illegitimate and legitimate children violates the equal protection clause of the United States'

Constitution.

...

Movants request this Court to accept this case in order to help and protect these children, currently on welfare, and to provide them with a reasonable and decent standard of living from their father who is a multi-millionaire. They are entitled under the law to the same standard of living they would have had if their parents had married and remained married;...

Respectfully submitted,

HARRIS & RAINES

BY: /s/ Paula M. Raines

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ATTORNEY FOR MOVANT

COMMONWEALTH OF KENTUCKY

SUPREME COURT

NO. 93-SC-000210

CABINET FOR HUMAN RESOURCES, EX REL.
FREDA LYNN KESLING (NOW SIMMONS)
and PAULA M. RAINES MOVANTS

VS: MOTION FOR DISCRETIONARY REVIEW

RANDY ROSS DEFENDANT

...

If the District Court's interpretation of 406.141 is correct, then 406.141 is clearly an unconstitutional denial of equal protection to nonmarital children. The U. S. Supreme Court has directly ruled on such a distinction. In a Wisconsin case, Gerhardt vs. Estate of Moore, 108 S.Ct. 2814 (1988) the U.S. Supreme Court

vacated a decision upholding such a statute pursuant to it's holding in Clark v. Jeter, (op. cit.), (Appendix "A") and remanded to the Wisconsin Supreme Court on the issue of whether a "...statutory provision denying nonmarital children involved in lump-sum child support settlements the ability to seek additional support from the father, a right not denied marital children, amounts to a denial of the equal protection of the law." Gerhardt vs. Estate of Moore, 441 N.W.2d 734 (Wis. 1989) (Appendix "B"). The Wisconsin Supreme Court held:

> Although Clark and the cases cited therein deal with statutory limitation bars to the filing of actions, the bar to seeking additional child

> support that results from a lump sum agreement works in precisely the same manner. Regardless of the label attached to the statutory bar, the result is the same. The nonmarital child, unlike the marital child, is barred from seeking additional support, regardless of need. That is hardly fair to the nonmarital child, much less constitutional. That is what the Unites States Supreme Court recognized in remanding this action, and that is what we recognize today. (Id at 738).

In the present case, this Court is faced with the same issue as the Wisconsin Supreme Court. This Court is

bound to the U. S. Supreme Court's holding in Clark v. Jeter, (op cit), and should take this matter for discretionary review as there have been clearly erroneous decisions, or abuses of discretion, in all lower courts.

...

XI. Whether the Paternity Statutes' silence as to the award of attorney's fees creates an unconstitutional distinction between marital and nonmarital children.

The U.S. Supreme Court has held in Clark vs. Jeter, (op cit), (Appendix "A") that a state may not make laws which discriminate against nonmarital children. KRS 403.220 clearly allows courts the discretion of awarding attorney's fees and costs when child support is sought for marital children. Case law which

interprets this section allows an award where the trial court finds a discrepancy in the financial resources of the parties. (See Drake vs. Drake, Ky., App., 899 S.W.2d 710 (1991); Gentry vs. Gentry, Ky. 798 S.W.2d 928 (1990); Lampton vs. Lampton, Ky. App., 721 S.W.2d 736 (1986)). In the present case, mother is on welfare and her children are on medical cards while father is a multi-millionaire; certainly there exists a discrepancy in incomes. In addition, there is no requirement that a party prevail in order to be awarded attorney's fees. To allow for an award of attorney's fees for marital - but not for nonmarital children - is unconstitutional.

REASONS JUDGMENT SHOULD BE REVIEWED

Allowing the trial court's decision

to stand is a violation of the U.S. Constitution, Kentucky's Constitution, and in direct opposition to the U.S. Supreme Court's ruling in Clark vs. Jeter, (op cit), that a state cannot discriminate against nonmarital children. The decision is not only unconstitutional but also violative of public and statutory policy which requires the best interest of the child to override all other considerations. There is no law or policy interest in having children in Kentucky on welfare when their father, who has an ongoing duty to support, is living as a millionaire in Florida.

This case raises questions of first impression in Kentucky, an opinion on which will affect the way lump-sum settlements are handled in district courts throughout the state. The first

issue is whether parents in a paternity action can contract away the rights of children to support by signing a lump-sum agreement approved by the Court. The second is whether the Paternity Statutes, particularly 406.141, creates an unconstitutional distinction between marital and nonmarital children.

There are also important constitutional issues involved in Movant's request for attorney's fees, a question which comes up often in district courts. Do the equity powers of the District Courts allows for the award of attorney's fees for private counsel involved in paternity actions? If not, this Court must address the constitutionality of this failure since the U.S. Supreme Court has been clear in it's ruling that marital and nonmarital

children must not be treated differently. Since the dissolution statutes clearly allow attorney's fees, if the District Court does not have the authority to award in the same manner, an obvious discrimination is created.

Respectfully submitted,

BY: /s/ Paula M. Raines

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